

Pursuant to Ind.Appellate Rule 65(D),
this Memorandum Decision shall not be
regarded as precedent or cited before
any court except for the purpose of
establishing the defense of res judicata,
collateral estoppel, or the law of the
case.

ATTORNEY FOR APPELLANT:

JERRY T. DROOK
Marion, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

RYAN D. JOHANNINGSMEIER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

DANTAE D. FOUCE,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 27A02-0503-CR-185
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE GRANT SUPERIOR COURT
The Honorable Jeffrey D. Todd, Judge
Cause No. 27D01-0308-FA-102

December 30, 2005

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Dantae D. Fouce appeals his convictions of possession of cocaine with intent to deliver as a Class A felony,¹ possession of a controlled substance as a Class D felony,² and possession of marijuana as a Class A misdemeanor.³ He questions the trial court's admission of the evidence seized from his hotel room.⁴ We affirm.⁵

FACTS AND PROCEDURAL HISTORY

On July 31, 2003, Detective Marland Sands of the Grant County Joint Effort Against Narcotics ("J.E.A.N.") Team was conducting surveillance at a house on West 10th Street in Marion, Indiana. Fouce, driving a red Monte Carlo, stopped in front of the house. Detective Sands checked Fouce's driver's record with the Bureau of Motor Vehicles ("BMV") and found Fouce's license was suspended. Because Detective Sands was driving an unmarked police car, he did not stop Fouce.

The next day, Detective Sands spoke with Alondo Smith. Smith had been arrested recently and asked to speak with someone from the J.E.A.N. Team. Smith reported purchasing cocaine from Fouce on numerous occasions, including a recent \$500.00 purchase. Smith claimed Fouce drove a red car, stayed at the Hampton Inn, and had cocaine on his person. Police officers then began watching for Fouce at the residence on 10th Street and the Hampton Inn.

¹ Ind. Code § 35-48-4-1(a)(2). The offense is a Class A felony if the cocaine weighed three or more grams. *See* Ind. Code § 35-48-4-1(b)(1).

² Ind. Code § 35-48-4-7(a).

³ Ind. Code § 35-48-4-11.

⁴ Upon his arrest, Fouce admitted the cocaine in the hotel room was his and he intended to deal it. Fouce's issue statement asserts he challenges the admission of "his statements regarding those items." (Appellant's Br. at 1.) However, his arguments do not address why those statements were inadmissible. Accordingly, he waived any argument related to the admission of his statements.

⁵ We held oral argument at Elkhart Central High School in Elkhart, Indiana, on December 6, 2005. We thank the school, students, and local bar for their hospitality, and counsel for their willingness to travel. We commend the students for the quality of their questions and counsel for their capable advocacy.

Eventually, officers saw him at the Hampton Inn. When Fouce left the hotel in the red car, Detective Sands followed him. An officer in a marked police car stopped Fouce at 10th Street and Western Avenue. The officer removed Fouce from the car and patted him down. The pat down revealed \$2,100 and a Hampton Inn room key. A drug-sniffing dog was brought to the scene, but did not detect narcotics in Fouce's car. Because the BMV records no longer indicated Fouce's license was suspended, he was released.

Detectives then went to the Hampton Inn, where the desk clerk reported Fouce rented Room 320. Two drug-sniffing dogs were brought to the hotel and individually were walked down the hallway on the third floor. Each independently gave a positive reaction for narcotics outside the door to Room 320.

That same day, Detective Sands prepared a search warrant affidavit. As soon as he obtained the warrant, detectives searched Room 320 at the Hampton Inn. They discovered a clear plastic bag of marijuana, two baggies containing 19.45 grams and 9.01 grams of crack cocaine, a box of sandwich baggies, and a digital scale. In a drawer of the bedside table, detectives found Lortab, otherwise known as hydrocodone, which is a schedule III controlled substance. Also in the room was a receipt indicating Fouce paid cash for the room. When Fouce was interviewed later at the police station, he admitted the cocaine was his and he had planned to sell it.

The State charged Fouce with possession of cocaine with intent to deliver as a Class A felony, possession of a controlled substance as a Class D felony, and possession of marijuana as a Class A misdemeanor. Fouce filed a motion to suppress the evidence collected from his hotel room and the statements he made at the police station. After

hearing argument, the court denied Fouce's motion. During trial, Fouce objected to the admission of the evidence, but the court overruled his objection. The jury found Fouce guilty of all three counts. The court ordered Fouce to serve forty-two years, with two suspended to probation, for dealing cocaine. He was sentenced to three years for the Class D felony and one year for the Class A misdemeanor. The sentences were to be served concurrently.

DISCUSSION AND DECISION

Because the evidence was admitted at Fouce's trial, he appeals the admission of the disputed evidence. *See Packer v. State*, 800 N.E.2d 574, 578 (Ind. Ct. App. 2003) (defendant's argument regarding denial of his motion to suppress more appropriately framed as error in admission of evidence at trial), *trans. denied* 812 N.E.2d 795 (Ind. 2003). A trial court has broad discretion to determine what evidence to admit, and we review its decision for an abuse of discretion. *Id.* An abuse of discretion has occurred if the trial court's decision was against the logic and effect of the facts and circumstances before the court. *Id.*

The Fourth Amendment to the United States Constitution protects citizens from unreasonable searches and seizures.⁶ U.S. Const. Amend. IV. The Fourteenth Amendment extended to state governments the Fourth Amendment's requirements for constitutionally valid searches and seizures. *Figert v. State*, 686 N.E.2d 827, 830 (Ind. 1997). When a defendant challenges whether evidence was gathered properly under the Constitution, the State bears the burden of proving the evidence was admissible. *See*,

⁶ Because Fouce did not set out a separate argument regarding the appropriateness of the search herein under the Indiana Constitution, any such argument is waived. *See Jackson v. State*, 735 N.E.2d 1146, 1150 n.1 (Ind. 2000).

e.g., *Edwards v. State*, 759 N.E.2d 626, 630 (Ind. 2001) (discussing admissibility under the Fourth Amendment of evidence gathered by warrantless search); *Carter v. State*, 730 N.E.2d 155, 157 (Ind. 2000) (discussing admissibility of confession under the Fifth Amendment).

The Fourth Amendment demands that no search warrant be issued unless it is supported by probable cause. U.S. Const. Amend. IV (“no warrant shall issue, but upon probable cause”). Probable cause is “a fluid concept incapable of precise definition . . . [that] is to be decided based on the facts of each case.” *Figert*, 686 N.E.2d at 830. “Probable cause to search premises is established when a sufficient basis of fact exists to permit a reasonably prudent person to believe that a search of those premises will uncover evidence of a crime.” *Esquerdo v. State*, 640 N.E.2d 1023, 1029 (Ind. 1994).

When deciding whether to issue a search warrant, the judge’s task is “simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *Figert*, 686 N.E.2d at 830 (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983), *reh’g denied* 463 U.S. 1237 (1983)).

If a defendant questions the validity of the search warrant, the trial court’s duty is to determine whether a “substantial basis” existed to support the issuing judge’s finding of probable cause. *Id.* “‘Substantial basis requires the reviewing court, with significant deference to the [judge]’s determination, to focus on whether reasonable inferences drawn from the totality of the evidence support the determination’ of probable cause.” *Id.* (quoting *Houser v. State*, 678 N.E.2d 95, 99 (Ind. 1997)). When conducting its

review, the trial court may consider “only the evidence presented to the issuing [judge] and not post hoc justifications for the search.” *Id.* We review the issuance of a search warrant under the same standard the trial court employs. *Id.*

Detective Sands’ affidavit provided the following information specific to Fouce:

6. That on July 31, 2003 J.E.A.N. Team Detectives observed a red 2001 Chevy Monte Carlo, license plate number 27B1699, at the intersection of West 10th Street and New York Avenue, in Marion, Grant County, Indiana. Said vehicle was leaving a residence reported to be a crack house. Detective Nathan McBee identified the driver of said vehicle as Dante [sic] Fouce. Detective McBee knew Dante [sic] Fouce based upon prior contacts. Detectives requested a driver’s license check be conducted via Marion Police Department dispatch through the Indiana Bureau of Motor Vehicles. The result of said license check revealed that Dante [sic] Fouce’s driver’s license was suspended. Detectives saw Dante [sic] Fouce drive to 1422 W. 10th Street, Marion, Indiana, and park the vehicle.

7. That on August 1, 2003 Detective Marland Sands conducted an interview with Alondo Smith at the Grant County Sheriff’s Department. Mr. Smith voluntarily supplied Detective Sands with information regarding Dante [sic] Fouce. Specifically, Mr. Smith told Detective Sands that he had received one-half ounce of crack cocaine from Dante [sic] Fouce for \$500.00. Mr. Smith indicated that he had made numerous crack cocaine purchases from Fouce in the past. Smith also told Detective Sands that Fouce had two (2) ounces of crack cocaine with him today (August 1, 2003). Mr. Smith also told Detective Sands that Fouce was staying at the Hampton Inn. In addition to this information, Smith also told Detective Sands that Fouce was driving a red car registered to Patricia Harvey. Detectives were able to confirm the information on the car based upon their observations on July 31, 2003 and the license plate check they ran on the vehicle.

8. That on August 1, 2003 J.E.A.N. Team Detectives were conducting surveillance at the Hampton Inn and 1422 W. 10th Street. Detective Nathan McBee saw Dante [sic] Fouce arrive at the Hampton Inn driving the same red Chevy Monte Carlo that was seen on July 31, 2003. Detective McBee also saw Fouce enter the Hampton Inn and saw Fouce turn a light on inside one of the rooms on the third floor on the west side of the building. Detective McBee continued to survey the hotel and saw Fouce at the window of the room several times. After approximately twenty (20) minutes, Detective McBee saw Fouce leave the hotel in the red Chevy Monte Carlo. Detective Sands began following Fouce and observed him make two (2) erratic lane changes in heavy traffic without signaling, in

the 500 block of North Baldwin Avenue, near the North Park Mall. Detective Sands then called in for a Uniformed Marion Police Officer to conduct a traffic stop. Marion Police Officer Steve Wolf stopped Fouce in the area of 10th Street and Western Avenue. Fouce was detained for a brief period of time. During the detention, Officers walked K-9s around Fouce's car, and no indications of the presence of narcotics was [sic] given by either dog. Also, during the brief detention period, Detective McBee conducted a pat down of Fouce's outer clothing, at which time Detective McBee discovered a large wad, later discovered to be U.S. Cash Currency. Fouce indicated there was approximately \$2,100 which he received for mowing yards. Fouce indicated he had no other employment. A driver's license check was conducted and the result showed that Fouce's license was valid. Officer Wolf gave Fouce a warning for the unsafe lane movement, and Fouce was released.

9. Detectives then went to the Hampton Inn and found that room 320 was registered to Dante [sic] Fouce. Detectives then took two K-9s to the hallway where room 320 is located. Both dogs, trained in the detection of narcotics, walked by approximately 5-10 rooms, including room 320, and the only room either dog indicated the presence of narcotics was room 320.

(App. at 29-30.)

A. Hotel room

Fouce first contends the affidavit failed to connect drugs to Fouce's hotel room.

Ind. Code § 35-33-5-2 provides in relevant part:

(a) Except as provided in section 8 of this chapter, no warrant for search or arrest shall be issued until there is filed with the judge an affidavit:

(1) particularly describing:

(A) the house or place to be searched and the things to be searched for; or

(B) particularly describing the person to be arrested;

(2) alleging substantially the offense in relation thereto and that the affiant believes and has good cause to believe that:

(A) the things as are to be searched for are there concealed[.]

Fouce claims:

Detective Sands did not state that he had gained information from his informant that Fouce concealed contraband in the Hampton Inn nor did he state that there was good cause to believe that officers would find cocaine

in the hotel room when the warrant was obtained. In fact, the informant did not claim to ever have been inside Fouce's hotel room. No connection was made to the drug buy alleged to have taken place between Fouce and the informant and the Hampton Inn room the State sought to search.

(Appellant's Br. at 9.) He asserts this situation is similar to *Merritt v. State*, 803 N.E.2d 257 (Ind. Ct. App. 2004).

In *Merritt*, a confidential informant was in Merritt's home on one occasion when an unidentified black male offered to sell drugs to the informant. *Id.* at 258. No controlled buy occurred at Merritt's house to confirm the availability of drugs at that location. Execution of a search warrant for Merritt's house uncovered marijuana and cocaine. In reversing the denial of Merritt's motion to suppress that evidence, we explained why the search warrant affidavit was inadequate:

Officer Smiley did not state that the unidentified black male frequented, resided, or concealed contraband at [Merritt's house] nor did he state that there was good cause to believe that the black male would possess cocaine in the residence when the warrant was obtained. *See Doss v. State*, 649 N.E.2d 1045, 1048-49 (Ind. Ct. App. 1995) (finding affidavit lacked indicia of probable cause because it omitted important factual details). Moreover, contrary to the State's assertions, the affidavit did not set forth facts from which a reasonable inference could be drawn that numerous drug transactions had taken place at the residence, or that the residence was a "crack house." Accordingly, the trial court abused its discretion in denying Merritt's motion to suppress. *See Methene v. State*, 720 N.E.2d 384, 390 (Ind. Ct. App. 1999) (noting the requirement that an affidavit for a search warrant must apprise the magistrate of the underling facts and circumstances which tend to show that probable cause exists for the search).

Id. at 260-61. Fouce claims that, just as in *Merritt*, Smith provided no information connecting Fouce's dealing to his room at the Hampton Inn, and therefore Detective Sands' affidavit was inadequate to create probable cause for the warrant.

Fouce is incorrect. Two drug-sniffing dogs indicated drugs were located inside Fouce's hotel room. Fouce acknowledges the police took drug-sniffing dogs to the hotel, but claims "this fact does nothing to bolster the credibility of the informant or establish reliability regarding the informant's information regarding Fouce'[s] cocaine possession or sales of cocaine because the informant did not connect those transactions to that room." (Appellant's Br. at 10.) We disagree. The fact that two drug sniffing dogs individually indicated drugs were inside Fouce's hotel room ties Fouce's alleged drug dealing to that room despite the fact Smith did not indicate Fouce was keeping drugs at the hotel.⁷

B. Informant's credibility

Next, Fouce claims the affidavit was inadequate to demonstrate probable cause "because it lacked any indicia of reliability as to the informant." (Appellant's Br. at 6.) Uncorroborated hearsay from an informant whose credibility is unknown cannot provide probable cause to issue a search warrant. *Iddings v. State*, 772 N.E.2d 1006, 1013 (Ind. Ct. App. 2002), *trans. denied* 783 N.E.2d 700 (Ind. 2002). Accordingly, Ind. Code § 35-33-5-2 requires:

- (b) When based on hearsay, the affidavit must either:
 - (1) contain reliable information establishing the credibility of the source and of each of the declarants of the hearsay and establishing that there is a factual basis for the information furnished; or

⁷ The State asserts the dogs' indications outside Fouce's hotel room were sufficient in and of themselves to provide probable cause for the search warrant for the hotel room. (See Appellee's Br. at 12) (citing *United States v. Roby*, 122 F.3d 1120, 1125 (8th Cir. 1997), *reh'g denied*; *Wilson v. State*, 98 S.W.3d 265, 272 (Tex. Ct. App. 2002), *petition for review denied*.) We do not decide that issue today, as we look at the totality of the circumstances before the judge, which included the other information in the affidavit.

At oral argument, Fouce asserted we should not give weight to the alerts by the drug-sniffing dogs because the affidavit does not allege the dogs were reliable in their ability to locate drugs. We decline to address that argument, as Fouce did not raise it in his Appellant's Brief, in the motion to suppress he filed in the trial court, (see App. at 24-26), or in his objection to the evidence at trial. (See Tr. at 102-07, 128.)

(2) contain information that establishes the totality of the circumstances corroborates the hearsay.

We agree with Fouce the affidavit did not contain information establishing Smith's credibility as required of an affidavit under Ind. Code § 35-33-5-2(b)(1). However, we need not concern ourselves with that fact because most of Smith's hearsay was corroborated by police investigation.

Police confirmed Smith accurately reported Fouce drove a red car registered to Patricia Harvey. Surveillance and information from the desk clerk confirmed Fouce was staying at the Hampton Inn, as Smith had reported. Finally, Smith's allegation Fouce was a drug dealer was supported when a routine traffic stop of Fouce revealed Fouce was carrying \$2,100 in cash, and Fouce claimed his only employment was mowing lawns. Fouce's alleged drug dealing was also confirmed when two drug-sniffing dogs indicated drugs were being kept in the room Fouce rented. Because of that corroborating evidence, the affidavit was adequate under Ind. Code § 35-33-5-2(b)(2).

CONCLUSION

Because the information in the affidavit adequately tied Fouce's alleged drug dealing to the hotel room and because Smith's hearsay was corroborated by other information contained in the affidavit, the trial court did not err when it found probable cause for the search of Fouce's hotel room. Accordingly, the court did not abuse its discretion when it admitted at trial the evidence found in that room. We affirm.

Affirmed.

BARNES, J., and CRONE, J., concur.